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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RONALD BACON, Defendant and Appellant.	B203245 (Los Angeles County Super. Ct. No. BA306235)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mary Strobel, Judge. Affirmed in part, reversed in part, and remanded for resentencing.

Deborah Blanchard, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Kristofer Jorstad and Erika D. Jackson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Ronald Bacon, appeals from the judgment entered following his conviction, by jury trial, for possession of a controlled substance in jail, with prior prison term and prior serious felony conviction findings (Pen. Code, §§ 4573.6, 667.5, 667, subd. (b)-(i)).[1] Sentenced to state prison for four years, Bacon claims there was trial error. The Attorney General claims there was sentencing error.

The judgment is affirmed in part, reversed in part, and remanded for resentencing.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), we find the evidence established the following.

On July 4, 2006, Los Angeles Police Officers Brett Goodkin and David Sanchez searched a hotel room in which defendant Bacon was staying. The officers found 1.18 grams of methamphetamine, wrapped in 10 cellophane bags, inside a pair of shorts. After being read his *Miranda*[2] rights, Bacon admitted the shorts belonged to him, but said the methamphetamine did not. When Goodkin asked why there were 10 small baggies inside his shorts, Bacon laughed and said, "Whatever. This shit will never be filed," meaning that he would never be charged for possessing the methamphetamine.

The officers arrested Bacon and transported him to the Hollywood police station for booking. Arrestees are brought into the station through the back door. Next to that door is a large sign warning against bringing drugs into the jail. Goodkin pointed to the sign and asked Bacon if he had any more drugs on him. Goodkin testified he "advised [Bacon] that if he brought any narcotics into the jail it would be an additional charge." Bacon said he did not have anything else.

During the booking process, Bacon was taken into a room for a strip-search. Goodkin testified such strip searches are normally done in drug and weapons arrests "primarily for safety of not only the arrestees, but the rest of the jail population.

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1 All further statutory references are to the Penal Code unless otherwise specified.

2 *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602].

It's to ensure no contraband, either weapons or narcotics are getting into the jail." Goodkin saw Bacon hand the officer conducting the strip search a "clear plastic bag containing [a] green leafy substance resembling marijuana." A criminalist determined this bag contained 8.91 grams of marijuana.

CONTENTIONS

1. Bacon's conviction for possessing a controlled substance in jail violated his due process and Fifth Amendment rights.

2. The trial court erred by staying the prior prison term (§ 667.5) enhancements.

DISCUSSION

1. *Bacon's conviction did not violate due process or the Fifth Amendment.*

Bacon contends his conviction was unconstitutional. He claims section 4573.6 in effect required him to admit wrongdoing, which violated his Fifth Amendment right against self-incrimination. Bacon also claims his conviction violated due process because he did not voluntarily bring the marijuana into the jail. These claims are meritless.

a. *Section 4573.6 does not violate the Fifth Amendment.*

Section 4573.6 provides, in pertinent part: "Any person who knowingly has in his or her possession . . . in any . . . jail . . . any controlled substances, the possession of which is prohibited by Division 10 (commencing with Section 11000) of the Health and Safety Code, . . . without being authorized to so possess the same by the rules of the . . . jail . . . is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years. [¶] The prohibitions and sanctions addressed in this section shall be clearly and prominently posted outside of, and at the entrance to, the grounds of all detention facilities . . . ."

Initially, Bacon argues the Legislature never intended section 4573 to apply to arrestees, a statutory interpretation that would avoid the Fifth Amendment problem. But the plain language of the statute prohibits "any person" from knowingly possessing a controlled substance in jail. (See *People v. Trout* (1955) 137 Cal.App.2d 794, 796 [rejecting argument section 4573.6 does not apply to inmates: "Section 4573.6 is clear and unambiguous. It specifically applies to 'Any person,' which includes an inmate,

having in his possession the forbidden articles in any of the described institutions. It is subject to no other construction."].) As case law has recognized, section 4573.6 is part of a comprehensive legislative scheme whose purpose is to broadly prevent prisoners from gaining access to drugs. "Section 4573.6 is related to, and to be construed together with, Penal Code sections 4573 and 4573.5, which prohibit bringing or sending drugs or drug paraphernalia into a prison or jail. [Citation.] Obviously, the ultimate evil with which the Legislature was concerned was drug use by prisoners. Nevertheless, it chose to take a prophylactic approach to the problem by attacking the very presence of drugs and drug paraphernalia in prisons and jails. [Citation.]" (*People v. Gutierrez* (1997) 52 Cal.App.4th 380, 386.)

In support of his argument that section 4573.6 was not meant to apply to arrestees, Bacon cites language in *People v. Cardenas* (1997) 53 Cal.App.4th 240, to the effect that the sign required by section 4573.6 is aimed at jail visitors, not jail inmates. But *Cardenas*'s reasoning applies to *both* visitors *and* arrestees. The defendant in *Cardenas* argued that posting the warning sign was an element of section 4573.6, which had to be proved by the prosecution. *Cardenas* replied: "[A]ppellant neglects to establish the applicability of this posting requirement to him. The statute requires the prohibition of contraband to be posted *outside* of the detention facility. Clearly then, this notification is meant for visitors, not inmates." (*People v. Cardenas, supra,* at p. 246.) Because arrestees, like visitors, enter the jail from the outside, *Cardenas* does not help Bacon.

Bacon then argues that, if section 4573.6 does apply to arrestees, it violates the Fifth Amendment. He relies on a line of United States Supreme Court cases typified by *Marchetti v. United States* (1968) 390 U.S. 39 [88 S.Ct. 697], which held that federal statutes mandating the self-reporting of illegal gambling activities violated the Fifth Amendment.[3] Noting that "[t]he terms of the wagering tax system make quite plain that

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[3] Marchetti had been convicted of conspiracy to evade payment of federal wagering taxes, willful failure to pay the tax and willful failure to register before engaging in the occupation of accepting wagers (26 U.S.C. §§ 4411, 4412).

Congress intended information obtained as a consequence of registration and payment of the occupational tax to be provided to interested prosecuting authorities" (*id*. at pp. 58-59), *Marchetti* concluded "it can scarcely be denied that the obligations to register and to pay the occupational tax created for petitioner 'real and appreciable,' and not merely 'imaginary and unsubstantial,' hazards of self-incrimination." (*Id*. at p. 48.) *Marchetti* held: "[T]hese provisions may not be employed to punish criminally those persons who have defended a failure to comply with their requirements with a proper assertion of the privilege against self-incrimination." (*Id*. at p. 42.)

Bacon asserts "[t]he scenario in *Marchetti* . . . is identical to [his] situation." Not so. Section 4573.6 did not require Bacon to say anything, sign anything, or swear to anything. It did not require him to disclose any information whatsoever. Section 4573.6 merely prohibited him from possessing controlled substances in jail. Marchetti was convicted for not providing information; Bacon was convicted for knowingly bringing marijuana into a jail. The two situations are not analogous.

Bacon argues that he, like Marchetti, was put in the position of having to either violate one law (§ section 4573.6) or incriminate himself for already having violated a different law (Health & Saf. Code, § 11357, subd. (b) [possession of marijuana]). But that situation arises anytime a defendant tries to escape conviction on a charged offense, e.g., robbery or possession of drugs with intent to sell, by testifying he or she actually only committed a lesser included offense, e.g., theft or possession of drugs for personal use. *Marchetti* did not involve a greater crime/lesser included offense situation.

Moreover, Bacon did not, in the end, *either* admit his violation of Health and Safety Code section 11357 *or* violate section 4573.6. What Bacon chose to do was lie about having violated section 11357 and then proceed to violate section 4573.6. The Fifth Amendment did not give Bacon the right to lie about his possession of the marijuana. "[N]either the text nor the spirit of the Fifth Amendment confers a privilege to lie. '[P]roper invocation of the Fifth Amendment privilege against compulsory self-incrimination allows a witness to remain silent, but not to swear falsely.' " (*Brogan v. United States* (1998) 522 U.S. 398, 404 [118 S.Ct. 805].)

People v. Ross (2008) 162 Cal.App.4th 1184, rejected precisely the claim Bacon makes here. Ross was arrested for assault with a knife. The police patted her down, did not find any weapons, and then took her to jail. Upon arrival, Ross was asked if she had a weapon in her possession and she said "no." During the booking process, another search was made and the knife was discovered in her underwear. Ross was charged with bringing a deadly weapon into the jail (§ 4574), but the trial court dismissed the charge. When the People appealed, the Court of Appeal rejected Ross's contention "that she had a Fifth Amendment right not to disclose her possession of the knife because disclosure would have incriminated her. The knife apparently was the weapon that respondent had used in the commission of the assault . . . . Since her privilege against self-incrimination protected her from compulsory disclosure of the knife, respondent maintains that she could not have been lawfully convicted of violating section 4574, subdivision (a). [¶] We disagree. Respondent's Fifth Amendment privilege permitted her to remain silent. It did not protect her from the consequences of lying to a law enforcement officer, who had properly inquired whether she possessed any weapons." (*People v. Ross*, *supra*, at p. 1191.) "Section 4574 does not give arrestees a license to lie to law enforcement or correctional officials." (*Ibid*.)

Bacon's conviction for violating section 4573.6 did not violate his Fifth Amendment right against self-incrimination.

b. *Bacon's conviction for violating section 4573.6 did not violate due process.*

Bacon contends his conviction for violating section 4573.6 must be reversed on due process grounds because there was no evidence he committed a voluntary actus reus. He claims he did not voluntarily possess marijuana in jail; rather, the police forcibly brought him to jail at a time when he coincidentally had marijuana in his possession. This claim is meritless.

Bacon argues the evidence shows he never intended to bring marijuana into the jail, that he had no knowledge he would be entering a jail facility, and that he committed no voluntary act related to section 4573.6 because he was involuntarily taken to jail by

the police.[4] We disagree. When Bacon lied to Officer Goodkin about the marijuana in his possession, he manifested an intent to violate section 4573.6 by taking marijuana into the jail. At that moment, Bacon knew both that he had marijuana in his possession and that it would be illegal to have it inside the jail. By lying to Goodkin and entering the jail nevertheless, Bacon was guilty of knowingly possessing a controlled substance in jail.[5]

Two cases involving the possession of weapons in jail in violation of section 4574, a statute closely related to section 4573.6, demonstrate why this is so. In *People v. James* (1969) 1 Cal.App.3d 645, the defendant had been charged with violating former section 4574, which proscribed possession of a firearm by any person lawfully confined to jail. The defendant's story was "that he had taken the pistol from his home on the morning of his arrest, and placed it in his waistband where it was not discovered during

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[4] Bacon's due process claim is based on the general rule that a defendant who has not voluntarily broken the law cannot be guilty of a crime. For example, in *In re David W.* (1981) 116 Cal.App.3d 689, a minor was found to have violated the disorderly conduct statute (§ 647) because he had been "found in [a] public place under the influence of . . . any drug" and in "such a condition that he is unable to exercise care for his own safety." (*In re David W., supra*, at p. 692.) The minor's mother had called police and an ambulance when he became violent. The responding officers decided to take him to the hospital. As they were putting him in the patrol car, the minor cursed them. The Court of Appeal held the minor had not violated the disorderly conduct statute: "When the police found appellant, he was in a bedroom of his own home, which is manifestly not a public place within the meaning of the statute. [Citations.] [¶] Appellant came to be in a public place, to wit, the sidewalk in front of his home and the police vehicle en route to the hospital, only because he was taken there by the police while handcuffed and while apparently resisting at least to the extent of cursing the officers. [¶] . . . While he was in his home, appellant was not in violation of section 647, subdivision (f). Although the police had proper grounds and laudable motives to remove appellant for transportation to the hospital, the fact remains that he was compelled by the police officers to go to a public place." (*Ibid.*, fn. omitted.)

[5] As the parties note, on June 13, 2007, review was granted in *People v. Gastello* (S153170) and *People v. Low* (S151961) to decide the following issue: "Did the defendant violate Penal Code section 4573 [Controlled substances; bringing into prison, camp, jail, etc.] by knowingly having methamphetamine in his possession when he was brought into county jail after his arrest on other charges?"

the search when he was booked." (*People v. James*, *supra*, at p. 648.) The trial court granted the defendant's motion to set aside the information, but the Court of Appeal reversed: "The respondent admitted that he was in possession of the gun when he was arrested and when searched by two officers at the jail. He stated that he started to tell the officers about the gun but did not do so because he was scared. [¶] The question of whether a person confined in jail can be convicted under this section for *bringing* a firearm into a jail even though he did not voluntarily enter the jail need not be answered at this time. It is sufficient from the facts of this case that respondent knowingly *possessed* a firearm while in jail, after he had ample time to surrender it to the jailer. *The fact that respondent had no choice about going to jail is irrelevant. He knew he had the gun and he knew he should have turned it over to the jailer when he was booked*. . . . The respondent's action comes within that proscribed by Penal Code section 4574." (*Id*. at pp. 649-650, italics added.)

In *People v. Ross*, *supra*, 162 Cal.App.4th 1184, the trial court dismissed a charge of violating the current version of section 4574, which prohibits bringing a deadly weapon into a jail, because the defendant was an arrestee who had not voluntarily entered the jail. The Court of Appeal reversed: "[T]he actus reus of the crime was bringing a deadly weapon into a jail. The mens rea was respondent's knowledge that she possessed a deadly weapon and that the location was a jail." (*People v. Ross*, *supra*, at p. 1187.) "[W]e are convinced that the state Legislature intended that the statute would apply to the facts of the instant case. An arrestee commits a sufficiently voluntary act to violate the statute if he or she knowingly brings a deadly weapon into a jail after having denied possessing such a weapon. Section 4574 does not give arrestees a license to lie to law enforcement or correctional officials. Respondent, therefore, was obligated to disclose her possession of the knife or suffer the criminal penalties imposed by the statute. She had no choice whether to go to jail, but she was afforded the choice to not violate section 4574. Had she been truthful at booking, she would not have entered the jail with the knife and would not have been charged [with violating section 4574]." (*Id*. at p. 1191.)

Bacon's conviction did not violate due process.

2. *Incorrect sentencing on prior prison term findings.*

The Attorney General contends the trial court impermissibly stayed five prior prison term (§ 667.5, subd. (b)) enhancement findings. We agree.

The trial court imposed and then stayed execution of five one-year prior prison term enhancements. The Attorney General correctly points out that, in general, a prior prison term enhancement must be either struck or imposed; it cannot simply be stayed. (*People v. Campbell* (1999) 76 Cal.App.4th 305, 311 ["Although not raised by either party, the record discloses an additional error – the court's staying of the prison priors. On remand, assuming the prison priors are proven, the court must either impose the prior prison enhancements or strike them."]; *People v. Bradley* (1998) 64 Cal.App.4th 386, 390 ["To neither strike nor impose a prior prison term enhancement is a legally unauthorized sentence . . . ."].)

We agree with the Attorney General that the matter must be remanded so the trial court can resentence Bacon on the section 667.5 findings and either strike or impose those enhancements. We shall remand to the trial court for a limited resentencing.

DISPOSITION

The judgment is affirmed in part, reversed in part and remanded for resentencing. The sentence is vacated to the extent indicated in this opinion and the matter is remanded to the trial court for a limited resentencing.

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KLEIN, P. J.

We concur:

KITCHING, J. ALDRICH, J.